

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

KIM STANLEY LEE,

Defendant and Appellant.

C059680

(Super. Ct. No. P05CRF0678)

After the trial court denied his motion to suppress evidence, a jury found defendant Kim Stanley Lee guilty of possession of methamphetamine. Defendant admitted alleged enhancements and the trial court sentenced him to five years in state prison.

Defendant appeals, contending: (1) the trial court erred in denying his suppression motion; (2) the trial court erred in admitting evidence of an uncharged crime for possession of methamphetamine; (3) the prosecutor committed misconduct in closing argument; and (4) his admissions to the enhancement

allegations were not made "voluntarily and intelligently." We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 9, 2005, at approximately 9:15 p.m., El Dorado County Deputy Sheriff Eric Shawn Bidinger-Boggess was traveling along a road responding to a "9-1-1 hang-up call," when he spotted a truck parked on the side of the road. The truck's headlights were off, but the interior lights were on. Deputy Boggess thought the truck was suspicious because it was parked on a deserted road, near a residence from which the sheriff's department had just received a hang-up 911 call.

Deputy Boggess approached the truck and got out of his vehicle. The driver's side window was down and, as Deputy Boggess approached the truck, he smelled "burnt marijuana." When Deputy Boggess reached the truck, he observed defendant sitting in the driver's seat with the keys still in the ignition.

Deputy Boggess began talking to defendant, who acted nervous, "[s]hifting his eyes left to right, speaking quickly, [and] avoiding eye contact" Deputy Boggess asked defendant "who he was" and asked what he was doing parked on the side of the road at night. Defendant answered that he was waiting for his girlfriend.

Deputy Boggess then asked defendant for his name and date of birth. Defendant gave Boggess his driver's license and Boggess used that information to run a record check. In doing so, Boggess learned that defendant was a Penal Code section 290

registrant, but the address listed on defendant's driver's license did not match the address on file for defendant with the sheriff's office. Deputy Boggess then arrested defendant for failing to comply with his registration requirements. Deputy Boggess then secured defendant in the back of his patrol car and searched the interior of defendant's truck.

During the search of defendant's truck, Boggess found a green backpack on the floorboard, within reach of the driver's seat. Inside the backpack, Boggess found a "black film canister," inside of which was a "white plastic baggie." The white plastic baggie contained a white crystalline substance, which, based on his training and experience, Deputy Boggess believed to be methamphetamine.

Defendant was subsequently charged with possession of a controlled substance and failure to register after an address change. The charging information further alleged that defendant served two prior prison terms and failed to remain free from prison for five years, within the meaning of Penal Code section 667.5, subdivision (b). The charge for failing to register was later dismissed and defendant pled not guilty to the possession charge, demanding a jury trial.

Prior to trial, defendant moved to suppress the methamphetamine found in his truck. Defendant argued the search of his truck was unlawful because the arrest was unlawful. He argued the arrest was unlawful because the prosecution learned he did not violate his registration requirements and dropped the

related charge. The trial court rejected defendant's claim and denied his motion.

At the conclusion of trial, the jury found defendant guilty of possessing a controlled substance. Defendant admitted the enhancement allegations, and the trial court denied his *Romero*¹ motion, sentencing him to an aggregate term of five years in state prison. Defendant was awarded 37 days of custody credit and was ordered to pay a \$200 restitution fine and a \$200 parole revocation fine. Defendant appeals.

DISCUSSION

I

Unlawful Search

Defendant first contends the trial court erred in denying his motion to suppress because there were legally insufficient facts to support the search of his vehicle. We disagree.

"In reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

In support of his claim, defendant argues the warrantless search could not be justified as a search incident to arrest because the arrest was unlawful. Even a lawful arrest, however,

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

could not justify the warrantless search of defendant's truck under these circumstances. Pursuant to the recent United States Supreme Court decision, *Arizona v. Gant* (2009) 556 U.S. ____ [173 L.Ed.2d 485], "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Id.* at p. ____ [173 L.Ed.2d at p. 501].) Here, Officer Boggess testified that defendant was "in my patrol car, secured," at the time Officer Boggess searched defendant's vehicle. Accordingly, the warrantless search cannot be justified as a search incident to arrest.

Nevertheless, the trial court also found the warrantless search of defendant's truck was justified by probable cause. As noted in *Gant*, "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence may be found." (*Arizona v. Gant, supra*, 556 U.S. at p. ____ [173 L.Ed.2d at p. 498].) Defendant argues this finding also was erroneous.

Defendant argues first that the finding is erroneous because Officer Boggess testified "he searched the vehicle incident to arrest and not because he smelled burning marijuana as he approached the vehicle." This argument is without merit. The trial court made a legal conclusion that the search was justified by probable cause, based on the smell of burnt

marijuana. Whether the officer testified that the search was incident to the arrest is irrelevant.

Next, defendant argues that the smell of burning marijuana alone is not sufficient to establish probable cause. Whether the smell of marijuana alone is enough, there was more here than the mere smell of marijuana. Defendant's truck was parked on a deserted road. His headlights were off, his windows were down, and the interior lights were on. As Officer Boggess reached defendant, he appeared nervous, shifting his eyes left to right, and refusing to make eye contact with the officer.

Under these circumstances, we conclude the trial court correctly found there was probable cause to search defendant's vehicle. (See *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1055, 1059, citing *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320-1322 [finding probable cause when the smell of marijuana was emanating from a car parked in a public parking lot].)

Relying on California's Medical Marijuana Program² (Marijuana Program), defendant further contends that "[b]ecause possession of marijuana by some persons was legal at the time of [defendant]'s arrest and there were no other factors submitted to give the deputy probable cause to believe there was contraband in [defendant]'s vehicle, the record does not support the idea that probable cause would have existed to search [defendant]'s truck." Defendant is wrong.

² Health and Safety Code section 11362.7 et seq.

The Marijuana Program provides a limited *defense* for a narrowly defined group of people in possession of marijuana. (*People v. Wright* (2006) 40 Cal.4th 81, 85.) It does not, as defendant suggests, allow those outside the Marijuana Program to be free from search or arrest when the smell of burnt marijuana emanates from their parked vehicle. Defendant does not now and did not in the trial court, claim to come within the protections of the Marijuana Program. Accordingly, his argument is without merit.

Next, defendant argues the smell of marijuana cannot support a finding of probable cause because, when Officer Boggess searched the truck, he did not find any marijuana. Defendant is wrong. For the same reason the discovery of contraband in a warrantless search cannot create probable cause, the failure to discover contraband cannot dissipate the probable cause that justified a warrantless search.

II

Evidence Of Prior Uncharged Conduct

Defendant also claims the trial court erred in admitting evidence of defendant's prior uncharged crime for possession of methamphetamine.

Evidence of a person's character is inadmissible to prove the person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) However, Evidence Code section 1101, subdivision (b) allows admission of "evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent,

preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act.”

“‘The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.’ [Citation.] Evidence may be excluded under Evidence Code section 352 if its probative value is ‘substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ [Citation.] ‘Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value.’ [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.)

Evidence Code section 1101, subdivision (b), renders admissible evidence of prior acts in three general categories: identity, common design, and intent. The least degree of similarity between the uncharged act and the charged offense is required to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) “In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance.” (*People v. Lindberg, supra*, 45 Cal.4th at p. 23.)

"On appeal, we review a trial court's ruling under Evidence Code section 1101 for abuse of discretion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

The basis of defendant's argument is that the prior conduct was not sufficiently similar to the charged offense to support the inference that defendant acted with the same intent in each instance. We disagree.

Defendant's not guilty plea put in issue all the elements of the charged offense. (*People v. Balcom* (1994) 7 Cal.4th 414, 422.) In order to prove unlawful possession of a controlled substance, the prosecution was thus required to prove physical or constructive possession of the methamphetamine found in defendant's truck, as well as defendant's knowledge of its presence and narcotic nature. (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.)

That defendant previously admitted to possessing methamphetamine, and transporting it inside a box on the floorboard inside his vehicle, presents a strong inference defendant knew the methamphetamine found in his truck in this instance was there and it was a narcotic. The probative value thus outweighs any minimal prejudice created by alerting the jury to defendant's history of drug convictions.

Thus, we cannot say the trial court abused its discretion in admitting evidence of defendant's prior conviction for possession of methamphetamine.

III

Prosecutorial Misconduct

Defendant also claims the prosecutor committed misconduct in his closing argument. A prosecutor's behavior violates the federal Constitution when it is so egregious it renders the trial unfair and constitutes a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Under California law, conduct by a prosecutor who does not render a trial unfair is nevertheless misconduct if it involves the use of deceptive or reprehensible methods in an attempt to persuade the court or jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) To preserve a claim of prosecutorial misconduct for appellate review, a defendant must timely object and request an admonition, unless an admonition would be futile. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Defendant asserts the prosecutor misstated the law of constructive possession during closing argument. The prosecutor argued as follows: "And the idea of constructive possession is what we need to focus on. Constructive possession means that you don't have to own it. That is exactly what the jury instruction says. And I encourage you to read that particular part. And it is included on the page where all of the elements are listed for possession of methamphetamine, and that says that two people can control something at the same time.

"So if you are sitting at home with your legs up on the coffee table and your roommate has some contraband, drugs, or whatever it may be on the kitchen table and it is not yours but you know it is there, you are guilty." (Italics added.)

Defendant contends the italicized portion of the prosecutor's closing argument was a misstatement of the law because the hypothetical was "void of reference to the element of dominion and control." While the prosecutor may not have used the words "dominion and control" in that hypothetical, when considered in context, we conclude there was no misconduct.

IV

Admissions Not Knowingly Or Intelligently Waived

Before a trial court can accept an accused's admission of prior felony convictions the accused must be advised of:

(1) the right against compulsory self-incrimination; (2) the right to confrontation; and (3) the right to a jury trial.³

(*People v. Mosby* (2004) 33 Cal.4th 353, 359-360, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 243 [23 L.Ed.2d 274, 279]; *In re Tahl* (1969) 1 Cal.3d 122, 132; *In re Yurko* (1974) 10 Cal.3d 857, 863.) A defendant need not be advised of all these rights if "the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances.'" (*Mosby*, at p. 360, italics omitted, quoting

³ These constitutional rights will hereinafter be referred to as defendant's *Boykin-Tahl* rights.

People v. Howard (1992) 1 Cal.4th 1132, 1175.) The pertinent inquiry is "whether the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived." (*Mosby*, at p. 361.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Ibid.*, quoting *People v. Allen* (1999) 21 Cal.4th 424, 438.)

In addition to advising an accused of his constitutional rights, a trial court must also advise the accused of the penal consequences of admitting a prior conviction. Our Supreme Court stated that "as a judicially declared rule of criminal procedure [citation] an accused, prior to the time the court accepts his admission of an allegation of a prior criminal conviction or convictions, is entitled to be advised: (1) that he may thereby be adjudged an habitual criminal . . . (2) of the precise increase in the term or terms which might be imposed, if any . . . and (3) of the effect of any increased term or terms of imprisonment on the accused's eligibility for parole." (*In re Yurko*, *supra*, 10 Cal.3d at p. 864.) A defendant "is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement." (*In re Moser* (1993) 6 Cal.4th 342, 352, citing

People v. Walker (1991) 54 Cal.3d 1013, 1022-1023.) Any "error is waived absent a timely objection." (*Walker*, at p. 1023.) Defendant contends that given the totality of circumstances, it cannot be shown that he was aware of his *Boykin-Tahl* rights because the record does not show whether he was advised of them in his previous convictions and he was not fully advised of them here. We disagree.

Prior to admitting the priors alleged, defendant was told "[y]ou can either admit if you suffered those prior convictions or we can have a trial on that issue." Defendant was then advised that the issue could be put to the jury or the court. Defendant then gave up his right to a jury, saying he would just admit the priors. He then asked to speak to counsel, who took him out of the courtroom.

Upon their return to the courtroom, defense counsel confirmed, on the record, that defendant knew admitting the priors would result in an increase in his punishment. The court specifically advised defendant that his exposure would be increased up to seven years if he admitted the prior convictions. Defendant said that he understood, and was giving up his right to a jury on that issue. The court then indicated it would decide whether the priors were valid.

Defense counsel then asked defendant if he wanted the judge to decide the issue, or did he simply want to admit the priors. Defendant said, "I admit them, Judge Keller, I do." The following colloquy then took place:

"MR. CLARK: It is up to you. I don't care one way or the other. Did we take a sufficient Tahl-Boykin waiver of his right to trial and the right to confront?

"THE COURT: Go ahead, Mr. Clark.

"MR. CLARK: On these prior convictions that we talked about, Mr. Lee, you have a right to be represented at that trial either before judge or a jury -- or before Judge Keller. You have a right to be represented by counsel, who is me, Jim Clark, and I would represent you throughout the course of those proceedings.

"You would have the right to point out to the judge any inconsistencies or problems with the paperwork that supports your prior convictions.

"You would have a right to testify on your own behalf.

"You would have a right to eventually subpoena witnesses and perhaps to assist you in this matter.

"Knowing these rights, do you give up those rights and admit the allegation that you suffered the two convictions that I have discussed with you?

"THE DEFENDANT: I admit I suffered the allegation.

"THE COURT: Okay. The other rights that Mr. Clark didn't cover is your right to confront and cross-examine the evidence.

"In other words, the D.A.'s evidence to prove those priors. You would have a right to question this evidence if you thought there was some infirmity in the evidence, and you have the right not to admit those priors.

"That is your right to remain silent, as well as your right to present a defense that Mr. Clark covered.

"So if you tell me you did those, and you are giving up your right to have the jury make that determination, you are incriminating yourself by telling me that you did those crimes.

"Do you understand and you are waiving all those rights?"

"THE DEFENDANT: I am trying to follow. I suffered the punishment for the crimes.

"THE COURT: Right.

"THE DEFENDANT: What I am admitting to."⁴

"THE COURT: So then we're not going to have a trial on whether you suffered those priors is what I am telling you. So you are giving up all those rights that we just explained?

"THE DEFENDANT: Yes."

Defendant then clarified he was also admitting to having failed to remain free from prison for five years, pursuant to Penal Code section 667.5, subdivision (b). Defendant was specifically advised of his *Boykin-Tahl* rights, he was given multiple opportunities to discuss those rights with his counsel, and he acknowledged understanding those rights and the ramifications of admitting the priors. Thus, while the exchange was perhaps disjointed, it is evident from the totality of the

⁴ On appeal, defendant misquotes this portion of the transcript, saying the quoted material reads "What *am I* admitting to," then argues there is a missing question mark, which raises the inference that defendant did not know what he was admitting. Defendant's recitation of the record is thus, inaccurate.

circumstances that defendant's waiver of his *Boykin-Tahl* rights was intelligently and voluntarily made. Therefore, we find no error.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.